(B) The amount of unused normal credit allowed for limited property for the taxable year. The amount of unused normal credit allowed for limited property is the amount of unused credit that would be allowed for the taxable year under section 38 by reason of section 46(b), taking into account the amount of unused credit that would be allowed for any preceding year, determined as if the Tax Reduction Act had not been enacted, multiplied by the fraction contained in paragraph (a)(3)(i)(B) of this section for the unused credit year.

(b) *New election*—(1) *In general.* A taxpayer who made a 1972 election for immedite flow-through under section 46(f)(3) with respect to limited property may elect to apply section 46(f)(3) to the additional credit allowed by the Tax Reduction Act of 1975 with respect to such property, or, if eligible, may make the election in paragraph (b)(2) of this section to apply section 46(f)(2) to such additional credit. The election to apply section 46(f) (2) or (3) must be made before June 28, 1975, in the manner provided in paragraph (c) of this section. If the taxpayer does not make a new election, section 46(f)(1) shall apply to additional credit for limited property. However, if the taxpayer made a 1972 election under section 46(f)(2) with respect to property to which section 46(f)(3) does not apply, then section 46(f)(2) shall apply to such additional credit notwithstanding any prohibition in section 46(f)(3) to the contrary.

(2) *Special section 46(f)(2) election.* A taxpayer who:

(i) Made a 1972 election under section 46(f)(3),

(ii) Did not make an election to apply section 46(f)(2) with respect to property to which section 46(f)(3) does not apply, and

(iii) Did not acquire property to which section 46(f)(1) applied in any taxable year ending before January 1, 1975, may elect to apply section 46(f)(2) to the additional credit allowed by the Tax Reduction Act of 1975 with respect to limited property notwithstanding any prohibition in section 46(f)(3) to the contrary.

(c) *Method of making election.* A taxpayer may make an election described in paragraph (b) of this section by filing a statement before June 28, 1975, with the district director or director of the internal revenue service center with whom the taxpayer ordinarily files its income tax return. For rules with respect to taxpayers filing consolidated returns, see § 1.1502–77(a) of part 1 of this chapter. The statement shall contain the following information: (1) The name, address, and taxpayer identification number of the taxpayer, and (2) the election which the taxpayer is making under paragraph (b) of this section. If a taxpayer is electing flow-through under section 46(f)(3), the statement shall also contain a written recitation that the election is made at the taxpayer's own option and without regard to any requirement imposed by an agency described in section 46(c)(3)(B) having jurisdiction over the taxpayer. The recitation shall be verified by a written declaration that it is made under the penalties of perjury.

(Secs. 46(f) and 7805 of the Internal Revenue Code of 1954 (85 Stat. 503, 68A Stat. 917; 26 U.S.C. 46, 7805))

[T.D. 7360, 40 FR 25472, June 16, 1975]

§ 9.2 [Reserved]

§ 9.3 Temporary TRASOP requirements for 1-percent additional investment credit.

The provisions listed in § 1.46–8 (a)(4) (i)–(ix) (Income Tax Regulations) are deemed effective only as temporary regulations under this section.

(Sec. 301(d)(2)(C) and (10) of the Tax Reduction Act of 1975 and sec. 7805 of the Internal Revenue Code of 1954 (89 Stat. 38, 68A Stat. 917 (26 U.S.C. 7805)))

[T.D. 7589, 44 FR 4145, Jan. 16, 1979; 44 FR 6715, Feb. 2, 1979]

PART 11—TEMPORARY INCOME TAX REGULATIONS UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

Sec.

AUTHORITY: Sec. 7805 of the Internal Revenue Code of 1954 (68A Stat. 917; 26 U.S.C. 7805), unless otherwise noted.

§ 11.401(a)–11 Qualified joint and survivor annuities.

(a) *In general*—(1) *General rule.* A trust, which is a part of a plan providing for the payment of benefits in any form of a life annuity (*i.e.*, an annuity requiring survival of the participant or his spouse as a condition for payment), shall not constitute a qualified trust under section 401(a)(11) and this section unless such plan provides that these benefits must be paid in a form having the effect of a qualified joint and survivor annuity. Therefore, any benefits which may be paid in any form of a life annuity must be paid in a form having the effect of a qualified joint and survivor annuity unless the participant makes the election, described in paragraph (c) of this section, not to receive benefits in this form. A plan will not fail to meet the requirements of section 401(a)(11) and this section merely because it provides that the spouse of a deceased participant may elect to have benefits paid in a form other than a qualified joint and survivor annuity. Section 401(a)(11) and this section shall apply only in the case of a plan to which section 411 (relating to minimum vesting standards) applies without regard to section 411(e)(2). Without regard to the election provided under paragraph (d)(3) of this section, unless an election has been made under paragraph (c) of this section, a plan to which this section applies must provide that a survivor annuity shall be payable on the death of an active participant after normal retirement age.

(2) *Illustration.* The provisions of this paragraph may be illustrated by the following example:

Example. The X Corporation Defined Contribution Plan was established in 1960. As in effect on January 1, 1974, the plan provided that, upon his retirement, a participant could elect to receive the balance of his individual account in the form of (1) a lump-sum cash payment, (2) a lump-sum distribution consisting of X Corporation stock, (3) five equal annual cash payments, (4) a life annuity, or (5) a combination of options (1) through (4). The plan also provided that, if a participant did not elect another form of distribution, the balance of his individual account would be distributed to him in the form of a lump-sum cash payment upon his retirement. Assume that section 401(a)(11) and this section first become applicable to the plan as of its plan year beginning January 1, 1976, with respect to persons who were active participants in the plan on such date (see paragraph (h) of this section). Unless the X Corporation Defined Contribution Plan either discontinues the life annuity payment option or is amended to provide that the balance of a participant's individual account will be paid to him in a form having the effect of a qualified joint and survivor annuity unless the participant elects another form of benefit payment, the trust established under the plan will fail to qualify under section 401(a).

(b) *Definitions.* As used in this section—

(1) *Qualified joint and survivor annuity.* The term ''qualified joint and survivor annuity'' means an annuity for the life of the participant with a survivor annuity for the life of his spouse which is neither (i) less than one-half of, nor (ii) greater than, the amount of the annuity payable during the joint lives of the participant and his spouse. A qualified joint and survivor annuity must be at least the actuarial equivalent of the normal form of annuity or any optional form of benefit offered under the plan. Equivalence may be determined, on the basis of consistently applied reasonable actuarial factors, for each participant or for all participants or reasonable groupings of participants, if such determination does not result in discrimination in favor of

employees who are officers, shareholders, or highly compensated. An annuity is not a qualified joint and survivor annuity if payments to the spouse of a deceased participant are terminated because of such spouse's remarriage.

(2) *Annuity starting date.* The term ''annuity starting date'' means the first day of the first period with respect to which an amount is received as an annuity, whether by reason of retirement or by reason of disability.

(3) *Earliest retirement age.* The term ''earliest retirement age'' means the earliest date on which, under the plan, the participant could elect to receive retirement benefits, including any benefit the participant is entitled to receive on account of disability.

(c) *Election not to take joint and survivor annuity form*—(1) *In general.* A plan shall not be treated as satisfying the requirements of this section unless each participant has the right to elect in writing not to take a joint and survivor annuity during a reasonable period before the annuity starting date. However, if a plan provides that a qualified joint and survivor annuity is the only form of benefit payable under the plan, no election need be provided.

(2) *Information to be provided to the participant.* (i) The plan administrator must furnish to the participant a written notification, in nontechnical terms, of the availability of the election provided by this paragraph, within a reasonable amount of time after the first day of the election period. This notification shall also inform the participant of the availability of the information specified in subdivision (ii) of this subparagraph.

(ii) The plan administrator must furnish to the participant a written explanation in nontechnical language of the terms and conditions of the joint and survivor annuity and the financial effect upon the participant's annuity (in terms of dollars per annuity payment) of making an election under this paragraph. This explanation must be provided to the participant within a reasonable amount of time from the date of the participant's request during the election period.

(3) *Form of election.* The election shall be in writing and clearly indicate that the participant is electing to receive his benefits under the plan in a form other than that of a joint and survivor annuity.

(4) *Election is revocable.* This election may be revoked in writing during the election period. After an election is revoked another election under this paragraph may be made during the election period.

(d) *Plans providing for early retirement*—(1) *Period during which qualified joint and survivor annuity not required.* Notwithstanding the provisions of paragraph (a) of this section, in the case of a plan which provides for the payment of benefits before the normal retirement age (as defined in section 411(a)(8)), the plan is not required to provide for the payment of annuity benefits in a form having the effect of a qualified joint and survivor annuity during the period beginning on the date on which the employee enters into the plan as a participant and ending on the later of—

(i) The date the employee reaches the earliest retirement age under the plan (as defined in paragraph (b)(3) of this section), or

(ii) The first day of the 120th month beginning before the date on which the employee reaches normal retirement age.

(2) *Period during which qualified joint and survivor annuity required.* (i) If a participant terminates employment and begins to receive retirement benefits during the period described in subparagraph (1) of this paragraph, he and his spouse must receive, after the termination of such period (or after the date such period would have terminated if the participant had survived), benefits having the effect of a qualified joint and survivor annuity, unless the participant has made an election under paragraph (c) of this section.

(ii) If a participant terminates employment and begins to receive retirement benefits after the period described in subparagraph (1) of this paragraph, he and his spouse must receive benefits having the effect of a qualified joint and survivor annuity, unless the participant has made an election under paragraph (c) of this section.

(iii) The provisions of this subparagraph may be illustrated by the following example:

Example. A plan which provides a benefit in the form of a life annuity also provides that a participant may retire before the normal retirement age of 65 and receive a benefit, if he has completed 30 years of service. A, an employee, became a participant at the age of 18. A retires and begins to receive retirement benefits at the age of 48. Unless A otherwise elects, the plan must provide a qualified joint and survivor annuity to A and his spouse after A reaches age 55 (the later of the earliest retirement age (age 48) or 10 years before normal retirement age (age 55)) or after the date A would have reached age 55, if he had survived. The survivor annuity paid to the spouse must satisfy the requirements of paragraph (b)(1) of this section. The plan may, but is not required to, provide the survivor annuity before age 55 if the participant dies between age 48 and age 55.

(3) *Election of survivor annuity*—(i) *In general.* (A) A plan described in subparagraph (1) of this paragraph does not meet the requirements of paragraph (a) of this section unless, under the plan, a participant may elect, during a reasonable period, a survivor annuity to be payable on his death during the period beginning on the date on which the period described in subparagraph (1) of this paragraph ends and ending on the date on which he reaches normal retirement age if he continues his employment during that period. Breaks in service during that period will neither invalidate a previous election or revocation nor prevent an election from being made or revoked during the election period.

(B) If a plan provides that a survivor annuity is the only form of benefit payable under the plan, no election need be provided.

(ii) *Example.* The provisions of subdivision (i) of this subparagraph may be illustrated by the following example:

Example. A plan which provides a life annuity also provides that a participant may retire before the normal retirement age of 65 and receive a benefit, if he has completed 30 years of service. Under this plan, an employee who became a participant at the age of 18 will be eligible to receive retirement benefits at the age of 48. This plan must allow a participant who continues his employment to elect a survivor annuity, described in subdivision (v) of this subparagraph, to be payable on the death of the participant if death occurs after age 55 (the later of the date the participant reaches the earliest retirement age (age 48) or 10 years before normal retirement age (age 55)) but before the date the participant reaches normal retirement age (age 65).

(iii) *Information to be provided by plan administrator.* (A) The plan administrator must furnish to the participant a written notification in nontechnical terms of the availability of the election provided by this subparagraph, within a reasonable amount of time after the first day of the election period. This notification shall also inform the participant of the availability of the information specified in subdivision (iii)(B) of this subparagraph.

(B) During the election period, the plan administrator must furnish to the participant, within a reasonable amount of time from the date of his request, a written explanation in nontechnical language of the terms and conditions of the survivor annuity and the financial effect upon the participant's annuity (in terms of dollars per annuity payment) of an election or of a revocation of an election under this subparagraph.

(iv) *Payments under the survivor annuity.* In order to meet the requirements of this subparagraph, if an election is made, the payments under the survivor annuity must not be less than the payments which would have been made under the joint and survivor annuity to which the surviving spouse would have been entitled if the participant had made the election described in this subparagraph immediately prior to his retirement and if his retirement had occurred on the day before his death and within the period during which an election can be made. For example, if a participant is entitled to a single life annuity of $100 per month or a reduced amount under a qualified joint and survivor annuity of $80 per month, regardless of when he makes a valid election under subparagraph (2) of this paragraph, his spouse is entitled to a payment of at least $40, but not more than $80 per month, under the survivor annuity.

(v) *Form of election.* The election shall be in writing and clearly indicate that the participant is electing the joint and survivor annuity form.

(vi) *Election is revocable.* An election under this subparagraph may be revoked in writing during the election period. After an election has been revoked, another election under this subparagraph may be made during the election period. See paragraph (c) of this section, relating to the right to elect not to take the joint and survivor annuity form.

(e) *Marriage requirements.* (1) A plan shall be treated as satisfying the requirements of this section even though it requires the participant and his spouse to have been married to each other on the annuity starting date.

(2) A plan shall be treated as satisfying the requirements of this section even though it provides that the spouse of the participant is not entitled to receive a survivor annuity (whether or not the election described in paragraph (d)(3) of this section has been made) unless the participant and his spouse have been married to each other throughout the 1-year period ending on the date of such participant's death.

(f) *Effect of participant's death on an election or revocation of an election under paragraph (c) or (d)(3).* A plan shall not be treated as not satisfying the requirements of this section merely because the plan contains a provision that any election made under paragraph (c) or (d)(3) of this section and any revocation of any such election does not become effective or ceases to be effective if the participant dies within a period, not in excess of 2 years, beginning on the date of such election or revocation. A plan containing a provision described in the preceding sentence shall not satisfy the requirements of this section unless it also provides that any such election and any revocation of any such election will be given effect in any case in which—

(1) The participant dies from accidental causes,

(2) A failure to give effect to the election or revocation would deprive the participant's survivor of a survivor annuity, and

(3) Such election or revocation is made before such accident occurred.

(g) *Costs of providing joint and survivor annuity form.* A plan may take into account in any equitable manner consistent with generally accepted actuarial principles applied on a consistent basis any increased costs resulting from providing joint and survivor annuity benefits.

(h) *Application and effective date.* (1) Section 401(a)(11) and this section shall apply to a plan only with respect to plan years to which section 411 (relating to minimum vesting standards) is applicable to the plan.

(2) Section 401(a)(11) and this section shall apply if—

(i) The participant's annuity starting date falls within a plan year beginning after December 31, 1975, and

(ii) The participant was an active participant in the plan on or after the first day of the first plan year beginning after December 31, 1975.

For purposes of this paragraph, the term "active participant" means a participant for whom benefits are being accrued under the plan on his behalf, the employer is obligated to contribute to or under the plan on his behalf, or the employer would have been obligated to contribute to or under the plan on his behalf if any contributions were made to or under the plan.

(Sec. 401(a)(11) of the Internal Revenue Code of 1954, 88 Stat. 935 (26 U.S.C. 401(a)(11)))

[T.D. 7379, 40 FR 45810, Oct. 3, 1975; 40 FR 49326, Oct. 22, 1975]

§ 11.401(a)–19 Nonforfeitability in case of certain withdrawals.

(a) *Application of section.* Section 401(a)(19) and this section apply to a plan to which section 411(a) applies. (See section 411(e) and § 11.411(a)–2 for applicability of section 411.)

(b) *Prohibited forfeitures*—(1) *General rule.* A plan to which this section applies is not a qualified plan (and a trust forming a part of such plan is not a qualified trust) if, under such plan, any part of a participant's accrued benefit derived from employer contributions is forfeitable solely because a benefit derived from the participant's contributions under the plan is voluntarily withdrawn by him after he has become a 50 percent vested participant.

(2) *50 percent vested participant.* For purposes of paragraph (b)(1) of this section, a participant is a 50 percent vested participant when he has a nonforfeitable right (within the meaning

of section 411 and the regulations thereunder) to at least 50 percent of his accrued benefit derived from employer contributions.

(3) *Certain forfeitures.* Paragraph (b)(1) of this section does not apply in the case of a forfeiture permitted by section 411(a)(3)(D)(iii) and §11.411(a)–4(b)(5)(i) (relating to forfeitures of certain benefits accrued before September 2, 1974).

[T.D. 7387, 40 FR 51421, Nov. 5, 1975]

§ 11.401(b)–1 Certain retroactive changes in plan.

(a) *General rule.* (1) Under section 401(b), a stock bonus, pension, profit-sharing or annuity plan or bond purchase plan which does not satisfy the requirements of section 401(a) on any day solely as a result of a disqualifying provision (as defined in paragraph (b) of this section) shall be considered to have satisfied such requirements on such day if there is adopted during the remedial amendment period (as determined under paragraphs (c) and (d) of this section) with respect to such disqualifying provision an amendment which causes the plan to satisfy all such requirements of section 401(a), 403(a) or 405(a) for the whole of the remedial amendment period (including extension thereof).

(2) This section shall not apply to any disqualifying provision if the remedial amendment period (as determined under paragraphs (c) and (d)(1) of this section determined without regard to paragraph (d)(2) of this section) with respect to such disqualifying provision ends prior to September 2, 1974.

(b) *Disqualifying provisions.* For purposes of this section, with respect to a plan described in paragraph (a) of this section the term ''disqualifying provision'' means any provision of—

(1) A plan as adopted,

(2) A plan amendment, or

(3) The Employee Income Security Act of 1974 (Pub. L. 93–406, 88 Stat. 829), which causes such plan to fail to satisfy the requirements of section 401(a), 403(a), or 405(a).

(c) *Remedial amendment period.* (1) The remedial amendment period with respect to a disqualifying provision begins on the effective date of the disqualifying provision. For purposes of this section, the effective date of a disqualifying provision is—

(i) In the case of a disqualifying provision in a plan as adopted, the date the plan is put into effect,

(ii) In the case of a plan amendment, the date the plan amendment is adopted or put into effect (whichever is earlier), or

(iii) In the case of a statutory provision described in paragraph (b)(3) of this section, the effective date of such provision.

(2) Unless extended as provided by paragraph (d) of this section, the remedial amendment period ends with the time prescribed by law (including extensions) for filing the return of the employer for the employer's taxable year in which falls—

(i) With respect to a disqualifying provision in a plan as adopted, or a plan amendment, the later of the date on which such provision was adopted or put into effect.

(ii) With respect to a statutory provision described in paragraph (b)(3) of this section, the effective date of such provision.

(d) *Extension for determination letters*—(1) *In general.* If, before the end of the remedial amendment period (determined without regard to this paragraph) with respect to a disqualifying provision, the employer or plan administrator files a request pursuant to §601.210(o) of this chapter (Statement of Procedural Rules) for a determination letter with respect to the initial qualifications of the plan or the effect of such disqualifying provision on the qualified status of the plan (or a trust which is part of a plan) under section 401(a), 403(a), or 405(a), then except as provided in subparagraph (3) of this paragraph, such remedial amendment period may be extended for a period not to exceed 150 days, beginning on the day after the last day of the employers taxable year in which falls the dates described in subdivisions (i) and (ii) of paragraph (c)(2) of this section. The 150-day period does not include any day on which there is pending before the Internal Revenue Service a request for a determination letter described in this subparagraph. For this purpose, such a request is considered to be pending before the Internal Revenue Service from the date it is filed with the Internal Revenue Service to the date on which notice of the final determination with respect to the request is issued by the Internal Revenue Service, the request is withdrawn, or the request is otherwise finally disposed of by the Internal Revenue Service.

(2) *Special rules.* Except as provided in subparagraph (3) of this paragraph, the period provided by subparagraph (1) of this paragraph shall not end prior to the later of December 31, 1975, or the expiration of 30 days after—

(i) The date on which a notice of final determination with respect to a request described in that subparagraph is issued by the Internal Revenue Service, or, where applicable,

(ii) The date on which a judgment pursuant to section 7476 (relating to declaratory judgments) by the United States Tax Court in a case or controversy involving such determination becomes final.

(3) *Overall limitation.* The period provided by subparagraph (1) of this paragraph shall not expire later than the last day (determined under section 6501) for assessment of any tax imposed by the Internal Revenue Code with respect to the taxable year of the employer immediately preceding the first day of such period.

(Sec. 401(b), Internal Revenue Code of 1954, 88 Stat. 943 (26 U.S.C. 401(b)))

[T.D. 7377, 40 FR 44544, Sept. 29, 1975]

§ 11.401(d)(1)–1 Nonbank trustees of trusts benefiting owner-employees.

(a) *Effective dates*—(1) *General rule.* For a plan not in existence on January 1, 1974, this section shall apply to the first plan year commencing after September 2, 1974, and all subsequent plan years.

(2) *Existing plans.* For a plan in existence on January 1, 1974, this section shall apply to the first plan year commencing after December 31, 1975, and all subsequent plan years.

(b) *In general.* For plan years to which this section applies, the trustee of a trust described in § 1.401–12(c)(1)(i) may (notwithstanding § 1.401–12(c)) be a person other than a bank (within the meaning of section 401(d)(1)) if he demonstrates to the satisfaction of the Commissioner that the manner in which he will administer trusts will be consistent with the requirements of section 401. Such demonstration must be made by a written application to the Commissioner of Internal Revenue, Attention: E:EP, Internal Revenue Service, Washington, DC 20224. Such application must meet the requirements set forth in paragraphs (c) to (g) of this section.

(c) *Fiduciary ability.* The applicant must demonstrate in detail his ability to act within the accepted rules of fiduciary conduct. Such demonstration must include the following elements of proof:

(1) *Continuity.* (i) The applicant must assure the uninterrupted performance of its fiduciary duties notwithstanding the death or change of its owners. Thus, for example, there must be sufficient diversity in the ownership of the applicant to ensure that the death or change of its owners will not interrupt the conduct of its business. Therefore, the applicant cannot be an individual.

(ii) Sufficient diversity in the ownership of an incorporated applicant means that individuals each of whom owns more than 20 percent of the voting stock in the applicant own, in the aggregate, no more than 50 percent of such stock.

(iii) Sufficient diversity in the ownership of an applicant which is a partnership means that—

(A) Individuals each of whom owns more than 20 percent of the profits interest in the partnership own, in the aggregate, no more than 50 percent of such profits interest, and

(B) Individuals each of whom owns more than 20 percent of the capital interest in the partnership own, in the aggregate, no more than 50 percent of such capital interest.

(iv) For purposes of this subparagraph, the ownership of stock and of capital and profits interests shall be determined in accordance with the rules for constructive ownership of stock provided in section 1563(e) and (f)(2). For this purpose, the rules for constructive ownership of stock provided in section 1563(e) and (f)(2). For this purpose, the rules for constructive ownership of stock provided in section 1563(e) and (f)(2) shall apply to a capital or profits interest in a partnership as if it were a stock interest.

(2) *Established location.* The applicant must have an established place of business in the United States where he is accessible during every business day.

(3) *Fiduciary experience.* The applicant must have fiduciary experience or expertise sufficient to ensure that he will be able to perform his fiduciary duties. Evidence of fiduciary experience must include proof that a significant part of the business of the applicant consists of exercising fiduciary powers similar to those he will exercise if his application is approved. Evidence of fiduciary expertise must include proof that the applicant employs personnel experienced in the administration of fiduciary powers similar to those he will exercise if his application is approved.

(4) *Fiduciary responsibility.* The applicant must assure compliance with the rules of fiduciary conduct set out in paragraph (f) of this section.

(5) *Financial responsibility.* The applicant must exhibit a high degree of solvency commensurate with the obligations imposed by this section. Among the factors to be taken into account are the applicant's net worth, his liquidity, and his ability to pay his debts as they come due.

(d) *Capacity to account.* The applicant must demonstrate in detail his experience and competence with respect to accounting for the interests of a large number of individuals (including calculating and allocating income earned and paying out distributions to payees). Examples of accounting for the interests of a large number of individuals include accounting for the interests of a large number of shareholders in a regulated investment company and accounting for the interests of a large number of variable annuity contract holders.

(e) *Fitness to handle funds*—(1) *In general.* The applicant must demonstrate in detail his experience and competence with respect to other activities normally associated with the handling of retirement funds.

(2) *Examples.* Examples of activities normally associated with the handling of retirement funds include:

(i) To receive, issue receipts for, and safely keep securities;

(ii) To collect income;

(iii) To execute such ownership certificates, to keep such records, make such returns, and render such statements as are required for Federal tax purposes;

(iv) To give proper notification regarding all collections;

(v) To collect matured or called principal and properly report all such collections;

(vi) To exchange temporary for definitive securities;

(vii) To give proper notification of calls, subscription rights, defaults in principal or interest, and the formation of protective committees;

(viii) To buy, sell, receive, or deliver securities on specific directions.

(f) *Rules of fiduciary conduct*—(1) *Administration of fiduciary powers.* The applicant must demonstrate that under applicable regulatory requirements, corporate or other governing instruments, or its established operating procedures:

(i)(A) The owners or directors of the applicant will be responsible for the proper exercise of fiduciary powers by the applicant. Thus, all matters pertinent thereto, including the determination of policies, the investment and disposition of property held in a fiduciary capacity, and the direction and review of the actions of all employees utilized by the applicant in the exercise of his fiduciary powers, will be the responsibility of the owners or directors. In discharging this responsibility, the owners or directors may assign to designated employees, by action duly recorded, the administration of such of the applicant's fiduciary powers as may be proper to assign.

(B) A written record will be made of the acceptance and of the relinquishment or closing out of all fiduciary accounts, and of the assets held for each account.

(C) At least once during each period of 12 months all the assets held in or for each fiduciary account where the applicant has investment responsibilities will be reviewed to determine the advisability of retaining or disposing of such assets.

(ii) All employees taking part in the performance of the applicant's fiduciary duties will be adequately bonded.

Nothing in this subdivision shall require any person to be bonded in contravention of section 412(d) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1112(d)).

(iii) The applicant will designate, employ, or retain legal counsel who will be readily available to pass upon fiduciary matters and to advise the applicant.

(iv) In order to segregate the performance of his fiduciary duties from other business activities, the applicant will maintain a separate trust division under the immediate supervision of an individual designated for that purpose. The trust division may utilize the personnel and facilities of other divisions of the applicant, and other divisions of the applicant may utilize the personnel and facilities of the trust division, as long as the separate identity of the trust division is preserved.

(2) *Adequacy of net worth.* (i) Not less frequently than once during each calendar year the applicant will determine the value of the assets held by him in trust. Such assets will be valued at their current value, except that the assets of an employee benefit plan to which section 103(b)(3)(A) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1023(b)(3)(A)) applies will be considered to have the value stated in the most recent annual report of the plan.

(ii) No fiduciary account will be accepted by the applicant unless his net worth (determined as of the end of the most recent taxable year) exceeds the greater of—

(A) $100,000, or

(B) Four percent of the value of all of the assets held by the applicant in trust (determined as of the most recent valuation date).

(iii) The applicant will take whatever lawful steps are necessary (including the relinquishment of fiduciary accounts) to ensure that his net worth (determined as of the close of each taxable year) exceeds the greater of—

(A) $50,000, or

(B) Two percent of the value of all of the assets held by the applicant in trust (determined as of the most recent valuation date).

(3) *Audits.* (i) The applicant will at least once during each period of 12 months cause detailed audits of the fiduciary books and records to be made by an independent qualified public accountant, and at such time will ascertain whether the fiduciary accounts have been administered in accordance with law, this section, and sound fiduciary principles. Such audits shall be conducted in accordance with generally accepted auditing standards, and shall involve such tests of the fiduciary books and records of the applicant as are considered necessary by the independent qualified public accountant.

(ii) In the case of an applicant who is regulated, supervised, and subject to periodic examination by a State or Federal agency, such applicant may adopt an adequate continuous audit system in lieu of the periodic audits required by paragraph (f)(3)(i) of this section.

(iii) A report of the audits and examinations required under this subparagraph, together with the action taken thereon, will be noted in the fiduciary records of the applicant.

(4) *Funds awaiting investment or distribution.* Funds held in a fiduciary capacity by the applicant awaiting investment or distribution will not be held uninvested or undistributed any longer than is reasonable for the proper management of the account.

(5) *Custody of investments.* (i) Except for investments pooled in a common investment fund in accordance with the provisions of paragraph (f)(6) of this section, the investments of each account will not be commingled with any other property.

(ii) Fiduciary assets requiring safekeeping will be deposited in an adequate vault. A permanent record will be kept of fiduciary assets deposited in or withdrawn from the vault.

(6) *Common investment funds.* Where not in contravention of local law the assets of an account may be pooled in a common investment fund (as defined in paragraph (f)(8)(iii) of this section) which must be administered as follows:

(i) Each common investment fund must be established and maintained in accordance with a written agreement, containing appropriate provisions as to the manner in which the fund is to be operated, including provisions relating to the investment powers and a general statement of the investment policy of the applicant with respect to the fund; the allocation of income, profits and losses; the terms and conditions governing the admission or withdrawal of participations in the fund; the auditing of accounts of the applicant with respect to the fund; the basis and method of valuing assets in the fund, setting forth specific criteria for each type of asset; the minimum frequency for valuation of assets of the fund; the period following each such valuation date during which the valuation may be made (which period in usual circumstances may not exceed 10 business days); the basis upon which the fund may be terminated; and such other matters as may be necessary to define clearly the rights of participants in the fund. A copy of the agreement must be available at the principal office of the applicant for inspection during all business hours, and upon request a copy of the agreement must be furnished to any interested person.

(ii) All participations in the common investment fund must be on the basis of a proportionate interest in all of the assets.

(iii) Not less frequently than once during each period of 3 months applicant must determine the value of the assets in the fund as of the date set for the valuation of assets. No participation may be admitted to or withdrawn from the fund except (A) on the basis of such valuation and (B) as of such valuation date. No participation may be admitted to or withdrawn from the fund unless a written request for or notice of intention of taking such action has been entered on or before the valuation date in the fiduciary records of the applicant. No request or notice may be canceled or countermanded after the valuation date.

(iv)(A) The applicant must at least once during each period of 12 months cause an adequate audit to be made of the common investment fund by a qualified public accountant.

(B) The applicant must at least once during each period of 12 months prepare a financial report of the fund which, based upon the above audit, must contain a list of investments in the fund showing the cost and current market value of each investment; a statement for the period since the previous report showing purchases, with cost; sales, with profit or loss and any other investment changes; income and disbursements; and an appropriate notation as to any investments in default.

(C) The applicant must transmit and certify the accuracy of the financial report to the administrator of each plan participating in the common investment fund within 120 days after the end of the plan year.

(v) When participations are withdrawn from a common investment fund, distributions may be made in cash or ratably in kind, or partly in cash and partly in kind, provided that all distributions as of any one valuation date must be made on the same basis.

(vi) If for any reason an investment is withdrawn in kind from a common investment fund for the benefit of all participants in the fund at the time of such withdrawal and such investment is not distributed ratably in kind, it must be segregated and administered or realized upon for the benefit ratably of all participants in the common investment fund at the time of withdrawal.

(7) *Books and records.* (i) The applicant must keep his fiduciary records separate and distinct from other records. All fiduciary records must be so kept and retained for as long as the contents thereof may become material in the administration of any internal revenue law. The fiduciary records must contain full information relative to each account.

(ii) The applicant must keep an adequate record of all pending litigation to which he is a party in connection with the exercise of fiduciary powers.

(8) *Definitions.* For purposes of this paragraph and paragraph (c)(5) of this section—

(i) The term ''account'' or ''fiduciary account'' means a trust described in section 401(a) (including a custodial account described in section 401(f)), a custodial account described in section 403(b)(7), or an individual retirement account described in section 408(a) (including a custodial account described in section 408(h)).

(ii) The term ''administrator'' means an administrator as defined in section 3(16)(A) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(16)(A).

(iii) The term ''common investment fund'' means a trust which satisfied the following requirements:

(A) The trust consists of all or part of the assets of several accounts which have been established with the applicant, and

(B) The trust is described in section 401(a) and exempt from tax under section 501(a), or is a common investment fund described in §1.408–2(b)(5) (as published with notice of proposed rulemaking in the FEDERAL REGISTER on February 21, 1975, at 40 FR 7661), or both.

(iv) The term ''employee benefit plan'' means an employee benefit plan as defined in section 3(2) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1002(2).

(v) The term ''fiduciary records'' means all matters which are written, transcribed, recorded, received or otherwise come into the possession of the applicant and are necessary to preserve information concerning the acts and events relevant to the fiduciary activities of the applicant.

(vi) The term ''qualified public accountant'' means a qualified public accountant as defined in section 103(a)(3)(D) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1023(a)(3)(D).

(vii) The term ''net worth'' means the amount of the applicant's assets less the amount of his liabilities, as determined in accordance with generally accepted accounting principles.

(g) *Special rules*—(1) *Passive trustee.* (i) An applicant who undertakes to act only as a passive trustee may be relieved of one or more of the requirements of this section upon clear and convincing proof that such requirements are not germane, under all the facts and circumstances, to the manner in which he will administer any trust. A trustee is a passive trustee only if under the written trust instrument he has no discretion to direct the investment of the trust funds or any other aspect of the business administration of the trust, but is merely authorized to acquire and hold particular investments specified by the trust instrument. Thus, for example, in the case of an applicant who undertakes merely to acquire and hold the stock of a single regulated investment company, the requirements of paragraphs (f)(1)(i)(C), (1)(iv), and (6) of this section shall not apply and no negative inference shall be drawn from the applicant's failure to demonstrate his experience or competence with respect to the activities described in paragraph (e)(2)(v) to (viii) of this section.

(ii) The determination letter issued to an applicant who is approved by reason of this subparagraph shall state that the applicant is authorized to act only as a passive trustee.

(2) *Federal or State regulation.* Evidence that an applicant is subject to Federal or State regulation with respect to one or more relevant factors shall be given weight in proportion to the extent that such regulatory standards are consonant with the requirements of section 401.

(3) *Savings account.* (i) An applicant will be approved to act as trustee under this subparagraph if the following requirements are satisfied:

(A) The applicant is a credit union, industrial loan company, savings and loan association, or other financial institution designated by the Commissioner;

(B) The investment of the trust assets will be solely in deposits in the applicant;

(C) Deposits in the applicant are insured (up to the dollar limit prescribed by applicable law) by an agency or instrumentality of the United States or a State.

(ii) Any applicant who satisfies the requirements of this subparagraph is hereby approved, and (notwithstanding paragraph (b) of this section) is not required to submit a written application. This approval takes effect on the first day after December 22, 1976, on which the applicant satisfies the requirements of this subparagraph, and continues in effect for so long as the applicant continues to satisfy those requirements.

(4) *Notification of Commissioner.* The applicant must notify the Commissioner in writing of any change which

affects the continuing accuracy of any representation made in the application required by this section, whether the change occurs before or after the applicant receives a determination letter. Such notification must be addressed to Commissioner of Internal Revenue, Attention: E:EP, Internal Revenue Service, Washington, DC 20224.

(5) *Substitution of trustee.* No applicant shall be approved unless he undertakes to act as trustee only under trust instruments which contain a provision to the effect that the employer is to substitute another trustee upon notification by the Commissioner that such substitution is required because the applicant has failed to comply with the requirements of this section or is not keeping such records, or making such returns, or rendering such statements as are required by forms or regulations.

(6) *Revocation.* Approval of the application required by this section may be revoked for any good and sufficient reason.

(Sec. 401(d)(1) and Internal Revenue Code of 1954 (88 Stat. 939 26 U.S.C. 401))

[T.D. 7383, 40 FR 48509, Oct. 16, 1975 as amended by T.D. 7448, 41 FR 55510, Dec. 21, 1976]

§ 11.402(e)(4)(A)–1 Lump sum distributions in the case of an employee who has separated from service.

(a) *Balance to the credit of an employee.* Section 402(e)(4)(A) provides that in order for a distribution or payment from a qualified plan to be a lump sum distribution, the distribution or payment must represent the employee's balance under the plan. The employee's balance does not include any amount which is forfeited under the plan (even though the amount may be reinstated) as of the close of the taxable year of the recipient within which the distribution is made. In addition, in the case of an employee who has separated from service, the employee's balance does not include an amount which is subject to forfeiture not later than the close of the plan year within which the employee incurs a one-year break in service (within the meaning of section 411) if—

(1) By reason of the break in service, the amount is actually forfeited at or prior to the close of that plan year, and

(2) The break in service occurs within 25 months after the employee's separation from service. In the case of a plan which uses the elapsed time method of crediting service, the break in service may occur within 25 months of the employee's severance from service. See Department of Labor regulations relating to the elapsed time method for the date an employee severs from service.

An employee may assume that an amount subject to forfeiture will be treated as forfeited by the date prescribed in paragraphs (a) (1) and (2) of this section if, under the plan, forfeiture will occur not later than that date. Therefore, he may assume that a distribution is a lump sum distribution at the time it is made, if the other requirements for lump sum distributions are satisfied. However, if the amount is not forfeited by that date, the amount will be taken into account in determining the balance to the credit of the employee. Accordingly, the distribution will not be a lump sum distribution because it did not include the employee's entire balance under the plan.

(b) *Rollover contribution.* As described in paragraph (a) of this section, an employee may assume that a distribution is a lump sum distribution even though part of the balance of his account has not been forfeited at the time the distribution is made. He may then roll the distribution over as a contribution to an individual retirement arrangement pursuant to section 402(a)(5) or 403(a)(4). It may be subsequently determined that the distribution was not a lump sum distribution because an amount subject to forfeiture was not in fact forfeited within the time required in paragraph (a) of this section. In that case, the contribution will be an excess contribution to the individual retirement arrangement, deemed made in the first taxable year of the employee in which it can be determined that an amount subject to forfeiture will not be forfeited.

(c) *Effective date.* This section is effective for distributions made in taxable years of recipients beginning after December 31, 1973.

[T.D. 7488, 42 FR 27882, June 1, 1977]

§ 11.402(e)(4)(B)–1 Election to treat an amount as a lump sum distribution.

(a) *In general.* For purposes of sections 402, 403, and this section, an amount which is described in section 402(e)(4)(A) and which is not an annuity contract may be treated as a lump sum distribution under section 402(e)(4)(A) only if the taxpayer elects for the taxable year to have all such amounts received during such year so treated. Not more than one election may be made under this section with respect to an employee after such employee has attained age 59½.

(b) *Taxpayers eligible to make the election.* Individuals, estates, and trusts are the only taxpayers eligible to make the election provided by this section. In the case of a lump sum distribution made with respect to an employee to 2 or more trusts, the election provided by this section shall be made by the employee or by the personal representative of a deceased employee.

(c) *Procedure for making election*—(1) *Time and scope of election.* An election under this section shall be made for each taxable year to which such election is to apply. The election shall be made before the expiration of the period (including extension thereof) prescribed in section 6511 for making a claim for credit or refund of the assessed tax imposed by Chapter I of Subtitle A of the Code for such taxable year.

(2) *Manner of making election.* An election by the taxpayer with respect to a taxable year shall be made by filing Form 4972 as a part of the taxpayer's income tax return or amended return for the taxable year.

(3) *Revocation of election.* An election made pursuant to this section may be revoked within the time prescribed in subparagraph (1) of this paragraph for making an election, only if there is filed, within such time, an amended income tax return for such taxable year, which includes a statement revoking the election and is accompanied by payment of any tax attributable to the revocation. If an election for a taxable year is revoked, another election may be made for that taxable year under subparagraphs (1) and (2) of this paragraph.

(Sec. 402(e)(4)(B) of the Internal Revenue Code of 1954 (88 Stat. 989, 26 U.S.C. 402(e)(4)(B)))

[T.D. 7339, 40 FR 1016, Jan. 6, 1975]

§ 11.404(a)(6)–1 Time when contributions to "H.R. 10" plans considered made.

(a) *In general.* Section 404(a)(6), as amended by section 1013(c)(2) of the Employee Retirement Income Security Act of 1974, provides that for purposes of paragraphs (1), (2), and (3) of section 404(a), a taxpayer shall be deemed to have made a payment on the last day of the preceding taxable year if the payment is on account of such taxable year and is made not later than the time prescribed by law for filing the return for such taxable year (including extensions thereof). Under section 1017(b) of the Employee Retirement Income Security Act of 1974 (prior to its amendment by the Tax Reduction Act of 1975), in the case of a plan which was in existence on January 1, 1974, the foregoing provision generally applies for contributions on account of taxable years of an employer ending with or within plan years beginning after December 31, 1975. In the case of a plan not in existence on January 1, 1974, the foregoing provision generally applies for contributions on account of taxable years of an employer ending with or within plan years beginning after September 2, 1974. See §11.410(a)–2(c) for time a plan is considered in existence. See also §11.410(a)–2(d), which provides that a plan in existence on January 1, 1974 may elect to have certain provisions, including the amendment to section 404(a)(6) contained in section 1013 of the Employee Retirement Income Security Act of 1974, apply to a plan year beginning after September 2, 1974, and before the otherwise applicable effective date contained in that section.

(b) *"H.R. 10" plans may elect new provision.* Under section 402 of the Tax Reduction Act of 1975 (89 Stat. 47), in the case of a plan which was in existence on January 1, 1974, and which provides contributions or benefits for employees some or all of whom are employees within the meaning of section 401(c)(1) of the Code and § 1.401–10(b), the provision described in paragraph (a) of this section shall apply for taxable years of an employer ending with or within plan years beginning after December 31, 1974, but only if the employer (within the meaning of section 401(c)(4) of the Code and § 1.401–10(e)) elects to have such provisions apply as provided in paragraph (c) of this section.

(c) *Manner of election.* The election described in paragraph (b) of this section shall be considered to be made if the employer (as described in paragraph (b) of this section)—

(1) Makes a contribution which relates to his preceding taxable year within the time prescribed in paragraph (a) of this section to a plan described in paragraph (b) of this section, and

(2) Claims a deduction for such contribution on his tax return for such year (or, in the case of a contribution by a partnership on behalf of a partner, the contribution is shown on Schedule K of the partnership tax return for such year); no formal statement is necessary. In the case of an employer whose income tax return for the year on account of which the payment is made is required to be filed (determined without regard to extensions of time) on or before April 15, 1976, and who made a payment within the time prescribed in paragraph (a) of this section, the election also may be made by filing an amended return or claim for refund with respect to such year on or before September 30, 1976.

(d) *Election is irrevocable.* Any election made under paragraph (c) of this section, once made, shall be irrevocable.

(e) *Examples.* The rules of this section are illustrated by the following examples.

Example (1). On October 15, 1976, the ABC Partnership made a contribution to the ABC Profit Sharing Plan and Trust on behalf of partners and common-law employees with respect to the plan year ending December 31, 1975. The ABC Profit Sharing Trust was exempt under section 501 (a) throughout 1975. The contribution for both partners and employees was reflected on the partnership return for the calendar year 1975 which was filed on October 10, 1976; proper extensions of the due date of the partnership return had been received, extending the due date to October 15, 1976. The election is valid since all requirements of this section have been met.

Example (2). The XYZ Partnership made a plan contribution on April 10, 1976, with respect to the plan year ending December 31, 1975, but the amount contributed for 1975 was not reflected in the partnership return filed for the calendar year 1975 on April 15, 1976. However, the XYZ Partnership filed an amended partnership return for the year 1975 on September 30, 1976, claiming a deduction for the employee-related contribution and setting forth on Schedule K the contribution relating to partners. The election is valid, since the contribution on account of 1975 was made within the time required, and was shown on the amended tax return of the employer for 1975 filed within the time prescribed in paragraph (c)(2) of this section.

Example (3). Mr. Smith, a sole proprietor whose taxable year is the calendar year, made a contribution to the Smith Profit Sharing Plan and Trust on April 15, 1976, for the plan year which began December 1, 1974, and ended November 30, 1975. The plan was in existence on January 1, 1974. Since the contribution was made within the time prescribed by this section and was on account of a taxable year of the employer ending within a plan year which began after December 31, 1974, the contribution may be deducted on Mr. Smith's return for 1975, even though the contribution was for a plan year beginning before December 31, 1974.

Example (4). The DEF Partnership, reporting its income on the basis of a fiscal year ending June 30, made a contribution to its ''H.R. 10'' plan which was in existence on January 1, 1974, and whose plan year was the calendar year. The contribution was made on September 30, 1975, and was on account of the taxable year of the partnership ending June 30, 1975. The contribution was properly reflected in the partnership return for the fiscal year ending June 30, 1975. The partnership's election to have section 404(a)(6), as amended, apply to its fiscal year ending June 30, 1975, is valid since that year ended with or within a plan year beginning after December 31, 1974.

[T.D. 7402, 41 FR 5633, Feb. 9, 1976]

§ 11.408(a)(2)–1 Trustee of individual retirement accounts.

A person may demonstrate to the satisfaction of the Commissioner that the manner in which he will administer the trust will be consistent with the requirements of section 408 only upon the filing of a written application to the

Commissioner of Internal Revenue, Attention: E:EP, Internal Revenue Service, Washington, D.C. 20224. Such application must meet the applicable requirements of the regulations under section 401(d)(1) relating to nonbank trustees of pension and profit-sharing trusts benefiting owner-employees.

(Sec. 408(a)(2) of the Internal Revenue Code of 1954 (88 Stat. 959, 26 U.S.C. 408(a)(2)))

[T.D. 7390, 40 FR 53580, Nov. 19, 1975]

§ 11.410–1 Election by church to have participation, vesting, funding, etc., provisions apply.

(a) *In general.* If a church or convention or association of churches which maintains any church plan, as defined in section 414(e), makes an election under this section, certain provisions of the Code and Title I of the Employee Retirement Income Security Act of 1974 (the ''Act'') shall apply to such church plan as if such plan were not a church plan. The provisions of the Code referred to are section 410 (relating to minimum participation standards), section 411 (relating to minimum vesting standards), section 412 (relating to minimum funding standards), section 4975 (relating to prohibited transactions), and paragraphs (11), (12), (13), (14), (15), and (19) of section 401(a) (relating to joint and survivor annuities, mergers and consolidations, assignment or alienation of benefits, time of benefit commencement, certain social security increases, and withdrawals of employee contributions, respectively).

(b) *Election is irrevocable.* An election under this section with respect to any church plan shall be binding with respect to such plan and, once made, shall be irrevocable.

(c) *Procedure for making election*—(1) *Time of election.* An election under this section may be made for plan years for which the provisions of section 410(d) of the Code apply to the church plan. By reason of section 1017(b) of the Act section 410(d) does not apply to a plan in existence on January 1, 1974, for plan years beginning before December 31, 1975. Section 1017(d) of the Act permits a plan administrator to elect to have certain provisions of the Code (including section 410(d)) apply to a plan before the otherwise applicable effective dates of such provisions. See § 420.0–1 of the regulations in this chapter (Temporary Regulations on Procedure and Administration under the Employee Retirement Income Security Act of 1974). Therefore, an election under section 410(d) of the Code may be made for a plan year beginning before December 31, 1975, only if an election has been made under section 1017(d) of the Act with respect to that plan year.

(2) *By whom election is to be made.* The election provided by this section may be made only by the plan administrator of the church plan.

(3) *Manner of making election.* The plan administrator may elect to have the provisions of the Code described in paragraph (a) of this section apply to the church plan as if it were not a church plan by attaching the statement described in subparagraph (5) of this paragraph to either (i) the annual return required under section 6058(a) (or an amended return) with respect to the plan which is filed for the first plan year for which the election is effective or (ii) a written request for a determination letter relating to the qualification of the plan under section 401(a), 403(a), or 405(a) of the Code and, if trusteed, the exempt status under section 501(a) of the Code of a trust constituting a part of the plan.

(4) *Conditional election.* If an election is made with a written request for a determination letter, the election may be conditioned upon issuance of a favorable determination letter and will become irrevocable upon issuance of such letter.

(5) *Statement.* The statement described in subparagraph (3) of this paragraph shall indicate (i) that the election is made under section 410(d) of the Code and (ii) the first plan year for which it is effective.

(Sec. 410(d), Internal Revenue Code, 1954 (88 Stat. 901; 26 U.S.C. 410(d)))

[T.D. 7363, 40 FR 27217, June 27, 1975]

§ 11.410(b)–1 Minimum coverage requirements.

(a)–(c) [Reserved]

(d) *Special rules.* (1) [Reserved]

(2) *Discrimination.* The determination as to whether a plan discriminates in favor of employees who are officers, shareholders, or highly compensated, is

made on the basis of the facts and circumstances of each case, allowing a reasonable difference between the percentage of such employees benefited by the plan to all employees benefited by the plan and the percentage of all such employees of the employer to all employees of the employer. A showing that a specified percentage of employees covered by a plan are not officers, shareholders, or highly compensated, without a showing that the difference (if any) between such percentage and the percentage of all employees who are not officers, shareholders, or highly compensated is reasonable, is not sufficient to establish that the plan does not discriminate in favor of employees who are officers, shareholders, or highly compensated.

(Sec. 410, Internal Revenue Code of 1954 (88 Stat. 898; 26 U.S.C. 410))

[T.D. 7380, 40 FR 45816, Oct. 3, 1975, as amended by T.D. 7508, 42 FR 47197, Sept. 20, 1977]

§ 11.412(c)–7 Election to treat certain retroactive plan amendments as made on the first day of the plan year.

(a) *General rule.* Under section 412(c)(8), a plan administrator may elect to have any amendment which is adopted after the close of the plan year to which it applies deemed to have been made on the first day of such plan year if the amendment—

(1) Is adopted no later than 2 and one-half months after the close of such plan year (or, in the case of a multiemployer plan, no later than 2 years after the close of such plan year),

(2) Does not reduce the accrued benefit of any participant determined as of the beginning of such plan year, and

(3) Does not reduce the accrued benefit of any participant determined as of the time of adoption of the amendment, or, if it does so reduce such accrued benefit, it is shown that the plan administrator filed a notice with the Secretary of Labor notifying him of the amendment, and—

(i) The Secretary of Labor approved the amendment, or

(ii) The Secretary of Labor failed to disapprove the amendment within 90 days after the date on which the notice was filed.

(b) *Time and manner of making election.* (1) The election under section 412(c)(8) shall be made by the plan administrator by a statement of election described in subparagraph (3) of this paragraph, attached to the annual return relating to minimum funding standards required to be filed under section 6058 with respect to the plan year to which the election relates.

(2) In the event that an amendment to which paragraph (a) of this section applies is adopted after the filing of the annual return required under section 6058, the plan administrator may make the election under section 412(c)(8) by attaching a statement of election, described in paragraph (b)(3) of this section, to a copy of such annual return, and filing such copy no later than the time allowed for the filing of such returns under section 6058. (In the case of multiemployer plans, such copy may be filed within a 24 month period beginning with the date prescribed for the filing of such returns.)

(3) The statement of election filed by or on behalf of the plan administrator shall—

(i) State the date of the close of the first plan year to which the amendment applies and the date on which the amendment was adopted;

(ii) Contain a statement that the amendment does not reduce the accrued benefit of any participant determined as of the beginning of the plan year preceding the plan year in which the amendment is adopted; and

(iii) Contain either—

(A) A statement that the amendment does not reduce the accrued benefit of any participant determined as of the time of adoption of such amendment, or

(B) A copy of the notice filed with the Secretary of Labor under section 412(c)(8) and a statement that either the Secretary of Labor has approved the amendment or he has failed to act within 90 days after notification of the amendment.

[T.D. 7338, 39 FR 44751, Dec. 27, 1974]

§ 11.412(c)–11 Election with respect to bonds.

(a) *In general.* Section 412(c)(2)(B) provides that, at the election of the administrator of a plan which includes a trust qualified under section 401(a) or of a plan which satisfies the requirements of section 403(a) or section 405(a), the value of a bond or other evidence of indebtedness which is held by the plan and which is not in default as to principal or interest may be determined on an amortized basis running from initial cost at purchase to the amount payable at maturity (or, in the case of a bond which is callable prior to maturity, the earliest call date). So long as this election is in effect, the value of any such evidence of indebtedness shall, for purposes of section 412, be determined on such an amortized basis rather than on a method taking into account fair market value as described in section 412(c)(2)(A).

(b) *Manner of making election.* The election to value evidences of indebtedness in accordance with paragraph (a) of this section shall be made by a statement to that effect attached to and filed as a part of the annual return of the plan required under section 6058 of the Code.

(c) *Effect of election.* The election provided by section 412(c)(2)(B), once made, will affect the valuation of all evidences of indebtedness, not in default as to principal or interest, which are held by the plan for the plan year for which the election is made and any evidences of indebtedness which are subsequently acquired by the plan. The value of any evidence of indebtedness which is in default as of the valuation date for the plan year must be determined on the basis of any reasonable actuarial method of valuation which takes into account fair market value in accordance with section 412(c)(2)(A) and must continue to be so valued until the indebtedness is no longer in default.

(d) *Consent to revoke required*—(1) *In general.* An election made in accordance with paragraph (a) of this section may be revoked only if consent to revoke the election is obtained from the Secretary or his delegate.

(2) *Manner of obtaining permission for revocation.* [Reserved]

(Secs. 302(c)(2)(B), 412(c)(2)(B) of the Internal Revenue Code of 1954 (88 Stat. 871, 914))

[T.D. 7335, 39 FR 44009, Dec. 20, 1974]

§ 11.412(c)–12 Extension of time to make contributions to satisfy requirements of section 412.

(a) *In general.* Section 412(c)(10) of the Internal Revenue Code of 1954 provides that for purposes of section 412 a contribution for a plan year made after the end of such plan year but not later than two and one-half months after the last day of such plan year shall be deemed to have been made on such last day. Section 412(c) (10) further provides that the two and one-half month period may be extended for not more than six months under regulations.

(b) *Six month extension of two and one-half month period.* (1) For purposes of section 412 a contribution for a plan year to which section 412 applies that is made not more than eight and one-half months after the end of such plan year shall be deemed to have been made on the last day of such year.

(2) The rules of this section relating to the time a contribution to a plan is deemed made for purposes of the minimum funding standard under section 412 are independent from the rules contained in section 404(a) (6) relating to the time a contribution to a plan is deemed made for purposes of claiming a deduction for such contribution under section 404.

(Sec. 412(c)(10), Internal Revenue Code of 1954 (88 Stat. 917; 26 U.S.C. 412(c)(10)))

[T.D. 7439, 41 FR 46597, Oct. 22, 1976]

PART 12—TEMPORARY INCOME TAX REGULATIONS UNDER THE REVENUE ACT OF 1971

Sec.

AUTHORITY: 26 U.S.C. 167, 263, and 7805.

§ 12.3 Investment credit, public utility property elections.

(a) *Elections*—(1) *In general.* Under section 46(e), three elections may be made on or before March 9, 1972, with